A **KAMRAN NEMATI HOSSEIN v. PP & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
B [CRIMINAL APPEALS NO: B-05-11-01-2013 & B-05-12-01-2013]
11 FEBRUARY 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 1483g of methamphetamine – Drugs found hidden in inner wall of bags –*
C *Whether appellants had mens rea possession of drugs – Whether appellants' conduct drew suspicion – Whether first appellant was an innocent carrier – Whether second appellant merely a tourist tagging along with first appellant – Weight of drugs – Whether presumption of trafficking correctly invoked by trial judge – Whether conviction and sentence of first and second appellants safe – Penal Code, s. 34*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Trafficking in dangerous drugs – Presumption of trafficking – Whether correctly invoked – Whether appellants' defence had rebutted presumption of trafficking – Whether appellants' defence sufficiently evaluated by trial judge – Whether there was any appealable error – Whether conviction and sentence of first and second*
E *appellants safe*

ASP Zamri bin Razak ('SP3') and five other policemen were conducting an operation at the KLIA Terminal, when SP3 observed the appellants were acting suspiciously. On the way out of the airport, the first appellant pushed a trolley with two bags on it. The second appellant, who had with him a sling
F bag, was closely following the first appellant. According to SP3, the appellants looked fearful when they were apprehended. SP3 examined the two bags which had the name tags of the first appellant. The bags were not locked but the keys to the bags were recovered from the trouser pocket of the first appellant. Upon further examination of the two bags, SP3 found two
G clear plastic packages hidden in the inner wall of each bags. Each package were later found to contain methamphetamine weighing a total of 1,483g ('the drugs'). The appellants were then jointly charged for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read together with s. 34 of the Penal Code. At the end of the prosecution's case, having
H considered the manner in which the drugs were concealed, the conduct of the appellants when they were apprehended and the weight of the drugs, the trial judge found that the appellants had *mens rea* possession of the drugs. The trial judge invoked s. 37(da) of the Act to establish a case of trafficking. Upon being called to enter their defence, both appellants gave evidence on oath.
I The essence of the first appellant's defence was that he was an innocent carrier. The first appellant testified that he had travelled from Tehran to

Syria by bus. At Syria airport, the first appellant met his friend one Mustafa who had given him two empty suitcases to be delivered to one Amir in Malaysia. Upon enquiries by the first appellant, Mustafa told the first appellant that the suitcases contained medication which was hidden to avoid tax. The first appellant further testified that the second appellant was merely tagging along with him. The second appellant denied having anything to do with the two bags containing the drugs. The trial judge found that the defence of the appellants did not create a reasonable doubt on the prosecution's case and did not rebut the presumption of trafficking. Therefore, the appellants were convicted and sentenced to death. Against the conviction and sentence, the appellants filed separate appeals. During the appeal, the first appellant argued that at the end of the prosecution's case, the trial judge had failed to adequately consider all evidence available, including evidence favourable to the defence, *inter alia*, that (i) the bags were not locked; and (ii) there was a doubt on the oral evidence of SP3 with regards to the conduct of the appellants as the conduct was not mentioned in the police report. The first appellant argued that had a maximum evaluation been carried out at the end of the prosecution case by the trial judge, at most, an offence of passive possession under s. 39A(2) of the Act would be established. On the other hand, the second appellant argued that the trial judge had failed to consider the defence of the second appellant *inter alia* that (i) his evidence that he was merely following the first appellant as a tourist was consistent with his cautioned statement; and (ii) the second appellant's version of events were supported by the oral evidence and the cautioned statement of the first appellant.

Held (dismissing first appellant's appeal and allowing second appellant's appeal)

Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The trial judge had correctly made a finding that a *prima facie* case had been made out against the appellants. In particular, the trial judge had considered the element of possession. The trial judge had also considered the issue of conduct. There was no merits in the submissions of the first appellant that the learned trial judge had failed to consider the evidence from all angles. For the element of trafficking, the trial judge found that since the weight of methamphetamine exceeded the statutory limit of 50g, the presumption pursuant to s. 37(da)(vi) of the Act was triggered to raise a case of trafficking. Therefore, the trial judge had not erred in the evaluation of the evidence and the application of the law. (paras 14 & 16-19)

(2) As regards the police report, the omission or the alleged inconsistencies did not affect the prosecution's case. The evidence of the prosecution witnesses as a whole was sufficient to establish a *prima facie* case against the appellant. There was no reason to intervene with the findings of the

trial judge at the end of the prosecution's case. Insofar as the first appellant was concerned, there was no appealable error in the evaluation of the defence and in the findings of the trial judge. (paras 19 & 20)

(3) The first appellant had not been consistent in his version. In his evidence in court, the first appellant stated that Mustafa handed the two bags to him at the Syria airport while in his cautioned statement, he stated that Mustafa had given him the bags at the bus terminal in Tehran. The defence was therefore not reasonable, failed to raise a reasonable doubt on the prosecution's case and failed to rebut the presumption of trafficking on a balance of probabilities. (para 21)

(4) In respect of the second appellant, his evidence that he came to Malaysia as a tourist and that he had no knowledge of the drugs was consistent with the second defendant's cautioned statement. The second defendant's version also found support in the oral evidence and the cautioned statement of the first appellant. However, the trial judge had failed to consider the evidence and the second appellants defence adequately. Had the learned trial judge considered all the evidence as required under s. 182A of the Criminal Procedure Code, the trial judge would have found that the defence of second appellant had raised a reasonable doubt on the prosecution's case and that the conviction of the second appellant was not safe. (paras 23 & 25)

Bahasa Malaysia *Translation Of Headnotes*

ASP Zamri bin Razak ('SP3') dan lima anggota polis lain telah menjalankan satu operasi di Terminal KLIA, apabila SP3 memperhatikan perayu-perayu dalam keadaan yang mencurigakan. Dalam perjalanan keluar dari lapangan terbang, perayu pertama telah menolak sebuah troli dengan dua beg di atasnya. Perayu kedua, yang membawa beg sandang, telah mengikuti perayu pertama dengan rapat. Menurut SP3, kedua-dua perayu kelihatan takut apabila mereka ditahan. SP3 telah memeriksa kedua-dua beg yang mempunyai tag nama perayu pertama. Beg-beg tersebut tidak dikunci tetapi kunci-kunci beg tersebut telah dijumpai dari dalam poket seluar perayu pertama. Setelah pemeriksaan lanjut kedua-dua beg tersebut, SP3 telah menjumpai dua paket plastik jelas tersembunyi pada bahagian dinding dalam setiap beg. Setiap paket kemudiannya didapati mengandungi methamphetamine seberat 1,483g ('dadah tersebut'). Perayu-perayu kemudiannya didakwa bersama bagi kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dibaca bersama s. 34 Kanun Keseksaan. Di akhir kes pendakwaan, setelah menimbangkan cara dadah tersebut disembunyikan, kelakuan perayu-perayu apabila mereka ditahan dan berat dadah, hakim bicara telah membuat dapatan bahawa perayu-perayu mempunyai milikan *mens rea* dadah tersebut. Hakim bicara telah

menggunapakai s. 37(da) Akta untuk memutuskan suatu kes pengedaran. Apabila dipanggil untuk membela diri, kedua-dua perayu telah memberi keterangan bersumpah. Intipati pembelaan perayu pertama adalah bahawa dia adalah pembawa tidak bersalah. Perayu pertama telah memberi keterangan bahawa dia pergi dari Tehran ke Syria dengan menaiki bas. Di lapangan terbang Syria, perayu pertama telah bertemu dengan rakannya, Mustafa yang telah memberikan kepada perayu pertama dua beg pakaian kosong untuk diserahkan kepada Amir di Malaysia. Apabila ditanya oleh perayu pertama, Mustafa memberitahu perayu pertama bahawa kandungan beg pakaian tersebut adalah ubat-ubatan yang disembunyikan untuk mengelakkan cukai. Perayu pertama selanjutnya memberi keterangan bahawa perayu kedua hanya mengikuti perayu pertama. Perayu kedua menafikan sebarang kaitan antara dia dengan kedua-dua beg yang mengandungi dadah tersebut. Hakim bicara mendapati pembelaan perayu-perayu tidak mewujudkan sebarang keraguan yang munasabah terhadap kes pendakwaan dan tidak mematahkan anggapan pengedaran. Oleh itu, kedua-dua perayu telah disabitkan dan dijatuhkan hukuman mati. Terhadap sabitan dan hukuman, perayu-perayu memfailkan rayuan berasingan. Dalam rayuan, perayu pertama menghujahkan bahawa di akhir kes pendakwaan, hakim bicara telah gagal untuk mempertimbangkan semua keterangan yang ada dengan secukupnya, termasuk keterangan yang memihak kepada pembelaan, antara lain, bahawa (i) beg-beg tersebut tidak dikunci; dan (ii) terdapat keraguan dalam keterangan lisan SP3 mengenai kelakuan kedua-dua perayu kerana kelakuan kedua-dua perayu tidak dinyatakan dalam laporan polis. Perayu pertama menghujahkan bahawa sekiranya penilaian maksimum dilakukan di akhir kes pendakwaan oleh hakim bicara, paling banyak, suatu kesalahan pemilikan pasif di bawah s. 39A(2) Akta akan terbukti. Sebaliknya, perayu kedua menghujahkan bahawa hakim bicara telah gagal untuk mempertimbangkan pembelaan perayu kedua, antara lain, bahawa (i) keterangan perayu kedua bahawa dia hanya mengikut perayu pertama sebagai pelancong adalah konsisten dengan kenyataan beramarannya; dan (ii) versi kejadian perayu kedua telah disokong oleh keterangan lisan dan kenyataan beramaran perayu pertama.

Diputuskan (menolak rayuan perayu pertama dan membenarkan rayuan perayu kedua)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah membuat dapatan yang betul bahawa suatu kes *prima facie* telah dibuktikan terhadap perayu-perayu. Khususnya, hakim bicara telah mengambil kira elemen pemilikan. Hakim bicara juga telah mengambil kira isu tingkah laku. Tiada merit dalam hujahan perayu pertama bahawa hakim bicara telah gagal mempertimbangkan keterangan dari semua sudut. Bagi elemen pengedaran, hakim bicara

telah mendapati bahawa, oleh kerana berat methamphetamine adalah melebihi had statutori sebanyak 50g, anggapan berdasarkan s. 37(da)(vi) Akta telah digunapakai untuk membuktikan satu kes pengedaran. Oleh itu, hakim bicara tidak terkhilaf dalam menilai keterangan dan penggunaan undang-undang.

(2) Berkenaan dengan laporan polis, peninggalan atau percanggahan yang didakwa tidak menjejaskan kes pendakwaan. Keterangan saksi-saksi pendakwaan secara keseluruhannya adalah mencukupi untuk membuktikan kes *prima facie* terhadap perayu. Tidak ada sebab untuk campur tangan dengan penemuan hakim bicara di akhir kes pendakwaan. Berkenaan isu perayu pertama, tiada kekhilafan yang boleh dirayu dalam penilaian terhadap pembelaan dan penemuan hakim bicara.

(3) Perayu pertama tidak konsisten dalam versinya. Dalam keterangannya di mahkamah, perayu pertama menyatakan bahawa Mustafa menyerahkan dua-dua beg tersebut di lapangan terbang Syria manakala dalam kenyataan beramarannya, perayu pertama menyatakan bahawa Mustafa telah memberi kedua-dua beg tersebut di terminal bas di Tehran. Pembelaan tersebut, oleh itu, adalah tidak munasabah, gagal menimbulkan sebarang keraguan munasabah terhadap kes pendakwaan dan gagal mematahkan anggapan pengedaran atas imbangan kebarangkalian.

(4) Berkenaan dengan perayu kedua, keterangan perayu kedua bahawa dia telah datang ke Malaysia sebagai pelancong dan bahawa dia tidak mempunyai pengetahuan tentang dadah tersebut adalah konsisten dengan kenyataan beramaran perayu kedua. Versi perayu kedua juga menyokong keterangan lisan dan kenyataan beramaran perayu pertama. Walau bagaimanapun, hakim bicara telah gagal mengambil kira keterangan tersebut dan pembelaan perayu kedua secukupnya. Sekiranya hakim bicara mempertimbangkan semua bukti sebagaimana yang dikehendaki di bawah s. 182A Kanun Prosedur Jenayah, hakim bicara akan mendapati bahawa pembelaan perayu kedua telah menimbulkan keraguan yang munasabah terhadap kes pendakwaan dan sabitan perayu kedua adalah tidak selamat.

Case(s) referred to:
Danny Phiri v. PP [2012] 1 LNS 437 CA ***(refd)***
Mohd Shukri Abu Seman v. PP [2012] 1 LNS 433 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A
Dangerous Drugs Act 1952, ss. 37A(da)(vi), 39A(2), 39B(1)(a)
Penal Code, s. 34

(Criminal Appeal No: B-05-11-01-2013)
For the appellant - Ariff Azami Hussein; M/s Azizzul & Ariff
For the respondent - Dalira Din; DPP

(Criminal Appeal No: B-05-12-01-2013)
For the appellant - N Sivananthan (Tina Ong with him); M/s Sivananthan
For the respondent - Dalira Din; DPP

[Editor's note: For the High Court judgment, please see PP v. Kamran Nemati Hossein & Anor [2013] 1 LNS 48.]

Reported by Sandra Gabriel

JUDGMENT

Maimun Tuan Mat JCA:

[1] The appellants were jointly charged in the High Court at Shah Alam for the offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) read together with s. 34 of the Penal Code. They were convicted and sentenced to death. Against the conviction and sentence, the appellants filed separate appeals. We heard both appeals together. In this judgment, we will refer to the appellant in Appeal No. B-05-11-01-2013 and B-05-12-01-2013 as the first appellant and the second appellant respectively. They were the first accused and the second accused respectively in the High Court.

[2] The case for the prosecution as set out by the learned trial judge was as follows. On 22 July 2010, ASP Zamri bin Razak (SP3) and five other policemen were conducting an operation at the luggage claim area G at the KLIA Terminal, when he observed two men (later identified as the appellants) were acting suspiciously. The appellants seemed hesitant to leave the luggage claim area and were continuously casting furtive glances left and right. When they finally decided to leave, the first appellant was seen pushing a trolley with two bags on it. The second appellant, who had with him a sling bag, was closely following the first appellant.

[3] The appellants were apprehended and according to SP3, they looked fearful ('sedikit takut'). The appellants were brought to the airport narcotics office for examination. A body search was done on both the appellants. Nothing incriminating was found on them. SP3 examined the two bags (exhs. P29 and P48) which had the name tags of the first appellant. The bags were not locked but the keys were recovered from the trouser pocket of the first appellant. There were only a few items of clothing and toiletries in both bags. The clothes were said to fit the appellants well.

[4] SP3 found the interior side wall of the bags thicker than ordinary bags. Upon further examination of both exhs. P29 and P48, SP3 found two clear plastic packages in each of the bags (exhs. P20 and P24; exhs. P11 and P15 respectively) hidden in the inner wall. Each package contained crystallite powders which were later confirmed by the chemist (SP3) to be methamphetamine weighing a total of 1,483g.

[5] At the end of the prosecution's case, having considered the manner the drugs were concealed, the conduct of the appellants when they were apprehended and the weight of the drugs, the learned trial judge found that the appellants had *mens rea* possession of the drugs. Her Ladyship then invoked s. 37(da) of the Act to find a case of trafficking. The appellants were called upon to enter their defence.

[6] Both appellants gave evidence on oath. The essence of the first appellant's defence was that he was an innocent carrier. He had travelled from Tehran to Syria by bus. At Syria airport, the first appellant met his friend, Mustafa. The first appellant stated that Mustafa had given him two empty suitcases and that upon enquiries, Mustafa told him that the suitcases contained medication which was hidden to avoid tax. The appellant was asked by Mustafa to deliver the bags to Amir in Malaysia. The first appellant further stated that the second appellant was merely tagging along.

[7] The second appellant testified that his purpose of coming to Malaysia was to tour the country. He denied having anything to do with the two bags containing the drugs. He stated that he only carried with him the sling bag and that his clothes were in the sling bag.

[8] The learned trial judge found that the defence of the appellants did not create a reasonable doubt on the prosecution's case and did not rebut the presumption of trafficking. The appellants were thus convicted and sentenced to death.

The Appeal

[9] Before us, the appellants raised only one ground of appeal. For the first appellant, learned counsel argued that at the end of the prosecution's case, the learned trial judge had failed to adequately consider all evidence available, including evidence favourable to the defence.

[10] It was the submission of learned counsel for the first appellant that the learned trial judge failed to consider the evidence from all angles, in particular the following evidence, which learned counsel contended was favourable to the defence:

(i) the bags were not locked;

(ii) there was a doubt on the oral evidence of SP3 as regards the conduct of the appellants as the conduct was not mentioned in the police report (exh. D67); and

(iii) the fitting exercise was flawed as the instruction to do the fitting was given by SP4 to the appellants by hand signal. The appellants were not conversant in English and there was no Iranian interpreter to assist the appellants. There was also no caution administered to the appellants under s. 37A of the Act.

[11] Learned counsel for the first appellant argued that had a maximum evaluation been carried out at the end of the prosecution case by the learned trial judge, the evidence disclosed at most, an offence of passive possession under s. 39A(2) of the Act. Learned counsel therefore urged us to substitute the conviction with one of possession.

[12] For the second appellant, the complaint was that the learned trial judge had failed to consider the defence. Learned counsel submitted that the learned trial judge had not considered the following evidence:

(i) that it was the first appellant who was pushing the trolley;

(ii) that the baggage tags were in the name of the first appellant;

(iii) that the defence of the second appellant that he was merely following the first appellant as a tourist was consistent with his cautioned statement; and

(iv) that the second appellant's version of events were supported by the oral evidence and the cautioned statement of the first appellant.

Our Decision

[13] Having considered the submissions of the parties and having perused the records of appeal, we unanimously dismissed the appeal of the first appellant and we allowed the appeal of the second appellant. We now give our reasons for the said decision.

[14] At the end of the prosecution's case, we found that the learned trial judge had correctly made a finding that a *prima facie* case had been made out against the appellants. In particular, the learned trial judge had considered the element of possession as follows (rekod rayuan jld 5, p. 435):

> In order to prove that both accused were having possession of the drugs, the prosecution has to establish that both accused had custody or control over the bags, and they knew that dangerous drugs were stored in the bags.
>
> The two bags (exhibit P29 and P48) were checked-in under the 1st accused's name as seen in the luggage tags (exhibit P34 and P58). The luggage collection tags (exhibit P48), the passports and electronic tickets were found with the 1st accused. The particulars such as passenger's name, flight number and the number of checked-in luggage printed on both luggage tags (exhibit P34 and P58) were consistent with the particulars on the passenger electronic tickets and luggage collection tags. Though the second luggage bag (exhibit P48) was checked-in under the name of the 1st accused, the evidence also showed that the 2nd accused had control over the bag. According to the investigating officer SP4, the 2nd accused picked out the clothes found in the second luggage bag and the clothing matched him. Based on SP3's observation, the 2nd accused was with the 1st accused all the times. His travelling documents were also found with the 1st accused. Therefore, the court is satisfied that both accused had control or custody over the bags containing the drugs.

[15] The learned trial judge further stated that (rekod rayuan jld 5, pp. 436-437):

> Counsel for the 2nd accused contended that the evidence revealed that the bags belonged to the 1st accused. The 2nd accused only had a sling bag with him. It was also put to SP4 that the clothing during the tryout session was taken from the sling bag (in which she disagreed). His caution statement (exhibit D71) was tendered to support his contention that the purpose of the visit to Malaysia was to tour the country.
>
> The court found that, the defense' contentions did not dwell well with the prosecution's evidence. As explained by SP3, only toiletries and personal hygienic products were found in the sling bag. This piece of evidence was not challenge by the defense.
>
> Eventhough exhibit D71 was admitted, it was an exculpatory statement. At this stage, the court could not rely on this statement to acquit the 2nd accused as the statement was not tested in cross-examination ...
>
> ...
>
> The drugs were cunningly concealed. The crystalline methamphetamine were absorbed into the fabric and carefully wrapped with clear plastic sheet. The packages were well hidden inside the interior side walls of both bags. The fabric covering the surface was lined perfectly to the interior side wall. According to SP3, there was nothing suspicious about the interior side walls of both bags if one were to examine it with the naked eye. SP3 only felt that the interior side walls were thicker when he touched the surface of the interior with his hand. It was to avoid detection of the authorities. [Ref to *Public Prosecutor v Abdul Rahman Akif* [2007] 4 CLJ 337 (FC) and *Teh Hock Leong v Public Prosecutor* [2008] 4 CLJ 764 (CA)].

[16] The learned trial judge had also considered the issue of conduct when Her Ladyship said (rekod rayuan jld 5, p. 438):

> According to SP3, both accused were acting suspiciously because they were keeping a look-out at the luggage claim area. They also look fearful when they were apprehended by the police. In the present case, the conduct of both accused was not taken in isolation but together with all the other facts and circumstances of the case. The drugs were discovered in the bags in which both accused had physical control or custody over them. Clothes that fitted both accused were also recovered. Their conduct and reaction were clearly admissible under section 8(2) of the Evidence Act 1950. The evidence assisted the prosecution and strengthened the inference that both accused had knowledge of the offending drugs at the material time [Also ref *Parlan Dadeh v Public Prosecutor* [2009] 1 CLJ 717].
>
> Their conduct and reaction, considered in the light of the evidence adduced, justifiably necessitated some explanation from them pursuant to section 9 of the same Act. ...
>
> In the present case, the defence attempted to discharge the onus in the course of the prosecution's case, by way of cross-examination of SP3 and SP4. The defence tried to explain that the accused were unfamiliar with the airport surrounding. However, SP5 (the Immigration Officer) informed

> the court that the 1st accused had came to Malaysia twice [on 29.4.2010 and 16.5.2010] prior to the present visit. The 2nd accused was travelling together with an experienced traveller. Therefore there was no reason for them to behave in that manner.

[17] We found no merits in the submissions of learned counsel for the first appellant that the learned trial judge had failed to consider the evidence from all angles. The learned trial judge had considered the facts highlighted by the defence when Her Ladyship stated that (rekod rayuan jld 5, p. 439):

> The defence also raised several facts and invited the court to make favourable inference that both the accused had no knowledge of the offending drugs i.e. (1) the packages were not effectively hidden; (2) the bags were not locked; and (3) both accused remained silent throughout the examination.
>
> The court referred to the case of *Tan Ong Keong v. Public Prosecutor* [2012] 4 CLJ 223 in which the Court of Appeal stated as follows:
>
> > [19] We accept the submission that the facts relied upon can give rise to the inference that he had no knowledge of the presence of the proscribed substance in the bag or its nature as a proscribed substance. We recognise, however, that except in the case of the clearest and most direct proof of guilt, almost all other combination of facts are always capable, at the same time, of an inference of guilt as well as innocence. To put it another way, it is always possible to structure an interpretation or inference consistent with innocence. But if in every case an accused is acquitted simply because of it is possible to construct such an interpretation or inference, the law cannot be enforced. ...

[18] As for the element of trafficking, the learned trial judge found that since the weight of methamphetamine exceeded the statutory limit of 50g, the presumption pursuant to s. 37(da)(vi) of the Act was triggered to raise a case of trafficking.

[19] In our judgment, the learned trial judge had not erred in her evaluation of the evidence and the application of the law. As regards the police report, it was our view that the omission or the alleged inconsistencies highlighted by learned counsel did not affect the prosecution's case (see *Danny Phiri v. PP* [2012] 1 LNS 437; *Mohd Shukri Abu Seman @ Hashim v. PP* [2012] 1 LNS 433). Even without the fitting exercise and the evidence of SP3 on the conduct, we were of the view that the evidence of the prosecution witnesses as a whole was sufficient to establish a *prima facie* case against the appellant. We found no reason to intervene with the findings of the learned trial judge at the end of the prosecution's case.

[20] Insofar as the first appellant was concerned, we found no appealable error in the evaluation of the defence and in the following findings of the learned trial judge (rekod rayuan jld 5, pp. 447-448):

> The 1st accused informed the court that Mustafa stayed in Sajad Street in Tehran. It goes against common sense for Mustafa to travel all the way to Syria airport just to hand over the suitcases to the 1st accused. If it was true that both bags belonged to Mustafa who had entrusted them to the 1st accused at the Syria airport, where was the 1st accused's own bag? Where did he keep his clothing and personal belongings during his journey from Tehran to Syria? ...
>
> If the bags belonged to Mustafa, there was no explanation as why the lock (exhibit P39A) was found in the 1st accused's trouser pocket, and why he had a lock with no bag of his own. Why would the 1st accused put his own clothes and personal belongings in Mustafa's bags?
>
> Thus, all in all, the court found that Mustafa as claimed by the 1st accused to have given time the incriminating bags does not exist. It was a crafted defence to throw the blame onto the fictitious character because the 1st accused was caught red-handed with the drug.

[21] Further, we noted that the first appellant had not been consistent in his version. In his evidence in court, the first appellant stated that Mustafa handed the two bags to him at the Syria airport (rekod rayuan jld 2, p. 114) while in his cautioned statement, he stated that Mustafa had given him the bags at the bus terminal in Tehran (rekod rayuan tambahan 1, p. 22). Looking at the evidence in totality, we agreed with the learned trial judge that the defence was not reasonable; that the defence failed to raise a reasonable doubt on the prosecution's case and failed to rebut the presumption of trafficking on a balance of probabilities.

[22] In respect of the second appellant, the learned trial judge made the following finding at the end of the defence case (rekod rayuan jld 5, p. 451):

> The 2nd accused arrived on 22.7.2010 and was scheduled to return on 26.7.2010. According to SP3's evidence, the items that were covered from the 2nd accused's sling bag (exhibit P59) were 1 towel, a phone charger, a hair gel, and a small pouch containing toiletries. The defence did not challenge this fact. If the defence' contentions were true, the court found it strange as the 2nd accused did not bring any spare clothing for his 4 days visit to Malaysia. The court found that the 2nd accused's defence was merely bare words ...

[23] To recapitulate, the defence of the second appellant was that he was merely following the first appellant to come to Malaysia. His evidence that he came to Malaysia as a tourist and that he had no knowledge of the drugs was consistent with his cautioned statement (exh. D71). The second appellant's version also found support in the oral evidence of the first appellant wherein the first appellant stated that (rekod rayuan jld 2, p. 117):

> Q: You said that Farshad just came as a tourist, right?
>
> A: Yes
>
> Q: Farshad doesn't know Mustafa?
>
> A: No

Q: Farshad has no idea about your arrangement with Mustafa? A

A: No nothing

Q: He don't know?

A: No

Q: Are you agree with me, Farshad gave you 1000 US dollar to buy ticket, anything, to bring him here? B

A: Yes I agree

Q: So Farshad paid for his entire trip to Malaysia?

A: Yes he is C

Q: ... I put it to you, you make mistake when you said "Mustafa told us" exactly Mustafa only told you about the bag, not Farshad. You agree with me?

A: Yes I agree.

D

[24] The second appellant's defence that he had no knowledge of the drugs was also consistent with the cautioned statement of the first appellant wherein the first appellant stated that (rekod rayuan tambahan, p. 23):

S: Dengan siapa kamu datang ke Malaysia?

J: DENGAN FARSHAD. E

S: Adakah Farshad turut terlibat dengan dadah yang dibawa oleh kamu?

J: TIDAK DAN TIDAK TAHU APA-APA.

[25] Having perused the grounds of judgment, we found that nowhere did F the learned trial judge consider the above evidence. We therefore agreed with learned counsel that the learned trial judge had failed to adequately consider the defence. Had the learned trial judge considered all the evidence as required under s. 182A of the Criminal Procedure Code, Her Ladyship would have found that the defence of second appellant that he had no G knowledge of the drugs had raised a reasonable doubt on the prosecution's case and that the conviction of the second appellant was not safe.

[26] In the light of all the above, we were unanimous in our decision that the appeal of the first appellant be dismissed. We affirmed the conviction and sentence of the High Court on the first appellant. The appeal by the second H appellant was allowed. We set aside the conviction and sentence of the High Court. The second appellant was acquitted and discharged.

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